

July 26 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 10-0029

Joe G. Hollingsworth, Esq.
Katharine R. Latimer, Esq.
HOLLINGSWORTH LLP
1350 I St. N.W.
Washington, DC 20005
(202) 898-5800
Fax: (202) 682-1639
jhollingsworth@hollingsworthllp.com

W. Carl Mendenhall, Esq.
WORDEN THANE P.C.
Attorneys at Law
P.O. Box 4747
Missoula, MT 59806-4747
(406) 721-3400
Fax: (406) 721-6985
cmendenhall@wthlaw.net

Attorneys for Novartis Pharmaceuticals Corporation

FILED

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

PEGGY L. STEVENS,

Plaintiff/Appellee,

-vs-

NOVARTIS PHARMACEUTICALS
CORPORATION,

Defendant/Appellant.

**NPC'S OPPOSITION TO
MOTION TO STRIKE PORTIONS
OF REPLY BRIEF**

In opposing NPC's statute of limitations argument on appeal, Stevens argued that the limitations period should be tolled under the doctrine of

NPC'S OPPOSITION TO MOTION TO STRIKE PORTIONS OF REPLY BRIEF

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1 cross-jurisdictional tolling. In its reply, NPC pointed out that this doctrine
2 has never been recognized in Montana, including by the trial court.
3 Stevens now attempts, in violation of the Montana Rules of Appellate
4 Procedure, to brief the issue once again. She astoundingly attempts a *fait*
5 *accompli* by including her argument in her unrelated cross-appeal reply
6 brief. Stevens' extraneous briefing should be rejected and her
7 accompanying "motion to strike" should be denied.

8 **I. Stevens' surreply violates the Court's rules.**

9 NPC's appeal issues include the fact that the trial court erroneously
10 denied NPC summary judgment based on limitations, and in the alternative
11 erroneously denied NPC a jury instruction on limitations. Stevens' cross-
12 appeal has nothing to do with limitations, and so her cross-appeal reply
13 brief may only respond to arguments *about the cross-appeal*. See Rule
14 12(3).

15 With regard to limitations, permissible briefing closed with NPC's
16 reply brief. In its opening brief, NPC argued that the limitations period had
17 run. Stevens, with the burden to prove an exception to the statute of
18 limitations, see *Israelson v. Mountain Tractor Co.*, 155 Mont. 69, 73, 467
19 P.2d 149, 151-52 (1970), elected to make a tolling argument in her answer
20 brief, citing authorities, see Answer at 23-27. NPC then responded in its
21 reply brief. It is simply wrong that tolling was "presented for the first time in
22 [the] reply brief," as Stevens contends as the sole basis for her "motion to
23 strike."
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1 **II. NPC was not required to address tolling in its opening**
2 **brief.**

3 Stevens cites no authority that a party must brief all potential
4 arguments that may be made by the other side and on which the other side
5 bears the burden of proof. Montana authority is directly to the contrary.
6 Under Rule 12(3), the appellant's reply brief is to respond to "*new matter*
7 raised in the brief of the appellee," which contemplates exactly the present
8 situation: NPC made its affirmative arguments, Stevens elected to raise
9 tolling in response, and NPC responded to it. This is in accord with the rule
10 nationwide: "[a]n appellant is not required to anticipate in its opening brief
11 every argument a respondent may make." *Dumag v. Allen*, No. F056376,
12 2010 WL 106805, at *9 (Cal. Ct. App. Jan. 13, 2010); *see also People v.*
13 *Whitfield*, 888 N.E.2d 1166, 1173 (Ill. 2007) ("It would be unfair for us to
14 require an appellant, when writing his or her opening brief, to anticipate
15 every argument that may be raised by an appellee.") (citing *Oliveira v.*
16 *Amoco Oil Co.*, 726 N.E.2d 51, 56 (Ill. Ct. App. 2000) *rev'd in part*, 776
17 N.E.2d 151 (Ill. 2002) ("[A]n appellant is under no obligation to anticipate
18 every argument an appellee might raise and address it in his opening
19 brief.")); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698,
20 701 (7th Cir. 2003) ("We do not require an appellant to anticipate and
21 preemptively address all defenses that an appellee might raise."). The
22 point is all the more obvious here, where the trial court never based any
23 decision on tolling or even mentioned it at any time,¹ and where Stevens

24 _____
25 ¹ The trial court rejected NPC's limitations defense as a result of the court's
26 erroneous interpretation of the fictitious name statute, and not because of
tolling. See, e.g., 10/8/09 Opinion & Order at 5.

1 herself chose *not* to argue tolling when opposing NPC's original dispositive
2 motion based on limitations. NPC's Reply at 9-10. Stevens could very well
3 have chosen again not to argue an issue of such limited viability.

4 Stevens' cited authorities do nothing to advance her position. She
5 misrepresents the Kansas federal district court opinion in *In re Urethane*
6 *Antitrust Litigation* as presenting "a nearly identical situation." The court
7 there declined to address a new *affirmative* argument that the statute of
8 limitations barred claims, an issue on which the appellant bore the burden
9 of proof but which she had not previously raised. 663 F. Supp. 2d 1067,
10 1083 n.11 (D. Kan. 2009). Each of Stevens' Ninth Circuit cases held that
11 *plaintiff* had waived the issue of tolling, an issue on which she bore the
12 burden of proof, by raising it for the first time in her reply brief. Here, NPC
13 correctly raised its limitations defense in its opening brief, Stevens, the
14 party with the burden on tolling, raised the argument at the appropriate
15 place, in her opposing brief, and NPC correctly responded in its reply brief.

16 **III. Stevens' latest round of briefing on her tolling argument**
17 **must be rejected.**

18 Having already argued tolling once, Stevens seeks to do so again
19 under the guise of having "a fair opportunity to respond." The Court should
20 not consider her further argument, which is a blatantly improper sur-reply.
21 *See Braten v. Kaplan*, No. 07 Civ. 8498(HB), 2009 WL 614657, at *2 n.1
22 (S.D.N.Y. Mar. 10, 2009) ("Allowing parties to submit surreplies is not a
23 regular practice that courts follow, because such a procedure has the
24 potential for placing a court in the position of refereeing an endless volley of
25 briefs."); *Lemond v. Capital One Bank*, No. 1:09-CV-01582-JOF, 2010 WL
26 761235, at *2 (N.D. Ga. Mar. 2, 2010) (same).

1 If NPC were to have a similar “fair opportunity to respond,” it would
2 point out (among other things) Stevens’ multiple misrepresentations of the
3 case law on cross-jurisdictional tolling. For example:

- 4 • Many federal courts in diversity have analyzed cross-
5 jurisdictional tolling and concluded that the state whose law
6 applied would not adopt the doctrine. Steven’s assertion to the
7 contrary, Reply at 4-5, is false.
- 8 • Many state courts have analyzed cross-jurisdictional tolling and
9 rejected it. Stevens’ assertion that these courts’ decisions were
10 based solely on “reasons unrelated to cross-jurisdictional
11 tolling,” Reply at 5-6, is false.
- 12 • Stevens’ contention that only “courts in four states have
13 rejected cross-jurisdictional tolling” is false, even if “courts” is
14 altered to “state appellate courts.” The California Supreme
15 Court case *Jolly* is one of multiple examples excluded from
16 Stevens’ count.

17 But there must be an end to briefing, and it should fall where the
18 Rules have placed it. The Court should not consider Stevens’ points – and
19 NPC should not be required to respond to them. Stevens’ “motion to strike”
20 should be denied and her reply brief should be stricken. NPC does not
21 oppose Stevens’ alternative request to file a replacement brief with the
22 improper surreply omitted.
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1 DATED this 26th day of July, 2010.
2

3 Joe G. Hollingsworth, Esq.
4 Katharine R. Latimer, Esq.
5 HOLLINGSWORTH LLP
6 1350 I St. N.W.
7 Washington, DC 20005

8 and

9 WORDEN THANE P.C.
10 P.O. Box 4747
11 Missoula, MT 59806

12 Attorneys for Novartis
13 Pharmaceuticals Corporation

14 By: W. Carl Mendenhall
15 W. Carl Mendenhall
16
17
18
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1 CERTIFICATE OF COMPLIANCE

2 Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I
3 certify that NPC's Opposition to Motion to Strike Portions of Reply Brief is
4 printed in a proportionally spaced Arial text typeface of 14 points; is double
5 spaced; and word count calculated by Word 2007 is 1,075 words, excluding
6 the Certificate of Service and this Certificate of Compliance.

7 DATED this 26th day of July, 2010.

8
9 Joe G. Hollingsworth, Esq.
10 Katharine R. Latimer, Esq.
11 HOLLINGSWORTH LLP
12 1350 I St. N.W.
 Washington, DC 20005

13 and

14 WORDEN THANE P.C.
15 P.O. Box 4747
16 Missoula, MT 59806

17 Attorneys for Novartis
18 Pharmaceuticals Corporation

19
20 By: W. Carl Mendenhall
21 W. Carl Mendenhall

CERTIFICATE OF SERVICE

I certify that on July 26, 2010, I served a copy of the preceding document on the following:

Terry N. Trieweiler, Esq. Trieweiler Law Firm P.O. Box 5509 Whitefish, MT 59937 Attorneys for Peggy L. Stevens	<input checked="" type="checkbox"/> Regular Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Email <input type="checkbox"/> Fax
James T. Towe, Esq. Towe Law Offices P.O. Box 7826 Missoula, MT 59807-7826 Attorneys for Peggy L. Stevens	<input checked="" type="checkbox"/> Regular Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Email <input type="checkbox"/> Fax
Robert G. Germany, Esq. Pittman, Germany, Roberts & Welsh, LLP 410 South President Street Jackson, MS 39201 Attorneys for Peggy L. Stevens	<input checked="" type="checkbox"/> Regular Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Email <input type="checkbox"/> Fax
Bartlett T. Valad, Esq. Valad & Vecchione, PLLC 3863 Plaza Drive Fairfax, VA 22030 Attorneys for Peggy L. Stevens	<input checked="" type="checkbox"/> Regular Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Email <input type="checkbox"/> Fax

Melanie L. Miller